Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-364

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

In the Interest of A.L.C.,
a person under the age of 18:

DEPARTMENT OF SOCIAL SERVICES
OF RUSK COUNTY,

Petitioner,

A.L.C., by her Guardian ad Litem,

Petitioner,

MR. AND MRS. B.J.,

Petitioners,

vs.

J.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

LINDA S. BALISLE
(Counsel of Record)
802 East Gorham Street
Madison, Wisconsin
(608) 258-3366

TERRY L. NUSSBERGER
(District Attorney of Rusk County)
RICHARD ALAN GINKOWSKI
(Immediate Past District Attorney
of Rusk County)
Rusk County Court House
311 Miner Avenue East
Ladysmith, Wisconsin
(715) 239-6921

MARY E. HOEL
(Guardian ad Litem)
202 Main Street
(715) 239-6921

QUESTIONS PRESENTED

1. Whether the rights to due process and equal protection under the law require a court, in reviewing an order terminating parental rights, to balance the best interests of a child with the procedural due process rights of the birth mother, when a failure to do so summarily voids the child's order of adoption and new birth certificate.

2. Whether a court decision which requires reversal of a termination of parental rights should be applied retroactively to cases where the judgment has been rendered, the adoption finalized, and the appeal taken after the adoption.

PARTIES TO THE PROCEEDINGS BELOW

The following are the parties who participated in the proceedings before the Wisconsin Supreme Court:

The Department of Social Services of Rusk County, Wisconsin, represented by Attorney Terry L. Nussberger, District Attorney of Rusk County, and Richard Alan Ginkowski, immediate past District Attorney of Rusk County, Rusk County Courthouse, 311 Miner Avenue East, Ladysmith, Wisconsin, 54848.

A.L.C., the minor child, represented by her Guardian ad Litem, Mary E. Hoel, Attorney at Law, P.O. Box 577, Cornell, Wisconsin, 54732.

Mr. and Mrs. B.J., adoptive parents of the minor child, represented by Attorney Linda S. Balisle, Stolper, Koritzinsky, Brewster & Neider, S.C., 802 East Gorham Street, P.O. Box 8743, Madison, Wisconsin, 53708-8743.

J.C., birth mother of the minor child, represented by Attorney Richard D. Martin, Assistant State Public Defender, P.O. Box 7862, Madison, Wisconsin, 53707-7862.

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Constitution, Statutes and Rules

Fourteenth Amendment	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

In the Interest of A.L.C.,
a person under the age of 18:

DEPARTMENT OF SOCIAL SERVICES
OF RUSK COUNTY,

Petitioner,

A.L.C., by her Guardian ad Litem,

Petitioner,

MR. AND MRS. B.J.,

Petitioners,

vs.

J.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a write of certiorari issue to review an order of the Wisconsin Supreme Court, dated and entered June 4, 1985, which denied petitioners' request for a review of a Wisconsin Court of Appeals' decision issued on April 16, 1985.

OPINIONS BELOW

This petition seeks review of a final order of the Wisconsin Supreme Court entered on June 4, 1985, which appears in Appendix A, *infra* (App. 1).

The Wisconsin Supreme Court dismissed a motion to reconsider and clarify the order of June 4, 1985, in an order dated June 21, 1985, a copy of which appears in Appendix B, *infra* (App. 2).

The Wisconsin Supreme Court, in its June 4, 1985, order, upheld the opinion of the Wisconsin Court of Appeals, dated April 16, 1985. The Court of Appeals' opinion was not published; a copy appears in Appendix C, *infra* (App. 3).

The order terminating J.C.'s parental rights by the Rusk County Circuit Court in the State of Wisconsin is not reported; a copy is attached in Appendix D, *infra* (App. 5).

JURISDICTION

The order of the Wisconsin Supreme Court, affirming the Court of Appeals' decision which reversed an order terminating J.C.'s parental rights, was entered on June 4, 1985. This petition for a writ of certiorari was filed within 90 days of that date. The Wisconsin Supreme Court, by an order dated June 21, 1985, dismissed a motion of reconsideration and clarification of the order dated June 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1, Fourteenth Amendment to the United States Constitution, provides, in relevant part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

One year after the minor child A.L.C. had been adopted and issued a new birth certificate, the Wisconsin Court of Appeals retroactively applied a Wisconsin Supreme Court decision directing trial courts to advise birth parents of their right to a jury trial in involuntary termination proceedings. In doing so, the Court of Appeals reversed the underlying order terminating the birth mother's (J.C.'s) parental rights, despite a stipulation by J.C.'s counsel to try the case to the trial court, despite the subsequent adoption of A.L.C., and despite the filing of the notice of appeal after the adoption. The Wisconsin Court of Appeals concluded that it was not required to consider the best interests of the child in making its determination to reverse the underlying termination order.

The Rusk County Department of Social Services (hereinafter the "Agency"), petitioned for termination of J.C.'s parental rights in August, 1982, when A.L.C. was three and one-half years old. The Agency alleged, and the trial court found, that J.C. provided intermittent and negligent care to A.L.C. and that she subsequently abandoned A.L.C. The petition alleged that before, during, and after J.C.'s incarceration for various offenses, J.C. was unable to provide a stable residence, to maintain employment, and to maintain regular contact with A.L.C. or the Agency regarding her whereabouts.

After a year and one-half of Agency assistance with basic parenting and living skills, J.C. was incarcerated in a Wisconsin correctional institution. The Agency continued to provide assistance to J.C.'s mother, who was caring for A.L.C. despite her own severe depressive episodes and history of suicide attempts, and despite her obligation to care for several older children who also required Agency intervention. At 21 months, A.L.C. was placed in foster care. The first foster mother found that A.L.C. required full-time parenting due to A.L.C.'s emotional difficulties, and requested that A.L.C. be placed in a different foster home when the first foster mother had to return

to work. The second foster parents reported gradual improvement in A.L.C.'s emotional state and behavior. See Appendix E, *infra* (App. 11).

After A.L.C. was placed in her second foster home, J.C. abandoned her and did not inform the Agency of her whereabouts. The Agency eventually found her in Florida, when her mother forwarded a letter containing her address to the Agency. See Appendix F, *infra* (App. 27) The Agency filed the petition to terminate J.C.'s rights, giving notice first by publication and rescheduling the initial hearings to ensure J.C.'s appearance and her representation by counsel.

At the first trial, J.C.'s counsel requested a substitution of judges, which the trial court denied. As a request for substitution is a matter of right in Wisconsin, the Wisconsin Court of Appeals, on July 1, 1983, granted J.C.'s motion for summary reversal of the trial court's order terminating her parental rights. On remand, the new trial court held a second fact-finding hearing on the original petition. J.C. was represented by the same court-appointed counsel who had represented her at the first hearing. Both parties stipulated to the admission of portions of testimony from the original hearing to the trial court, reserving the right to offer new testimony and arguments. On January 6, 1984, the trial court terminated, for a second time, J.C.'s parental rights to A.L.C. A dispositional order followed on January 9, 1984.

On March 27, 1984, A.L.C. was adopted by petitioners, Mr. and Mrs. B.J., who had been her third set of foster parents since April 28, 1983.

After the adoption, J.C. appealed from the second order terminating her parental rights to A.L.C. This appeal was based on a decision of the Wisconsin Supreme Court issued after the dispositional order of January 9, 1984, which terminated J.C.'s parental rights. In *In re the Termination of Parental Rights to M.A.M.*, 116 Wis. 2d 432, 342 N.W. 2d 410 (1984), the Wisconsin Supreme Court held that, in an involuntary termination proceeding, the trial court must independently advise parents of their statutory right to a jury trial. Despite the fact that *M.A.M.* was issued almost three weeks after the order terminating J.C.'s

parental rights, and despite her counsel's stipulation to try the case to the trial court. J.C. appealed the order, contending that the trial court's failure to advise her of her right to a jury trial required reversal of the order. She did not challenge the findings of neglect and abandonment on appeal. Petitioners, Mr. and Mrs. B.J., never received formal notice of this appeal.

The Wisconsin Court of Appeals concluded that *M.A.M.* applied because the time for appeal from the termination order had not expired, and reversed the second trial court order. Petitioners, anxious to preserve the integrity of A.L.C.'s new family, petitioned the Wisconsin Supreme Court to review the decision of the Court of Appeals. The petitioner questioned the Court of Appeals' retroactive application of law and alleged that A.L.C.'s rights to due process and equal protection of the laws were violated by the Court of Appeals' failure to consider her best interests. The Wisconsin Supreme Court dismissed the petition for review, and also dismissed a subsequent motion for reconsideration and clarification, thus upholding the decision of the Wisconsin Court of Appeals.

In July and August of 1985, J.C. returned to the trial court to vacate the March 27, 1984, order of adoption, to dismiss the initial petition for termination of parental rights, and to obtain physical custody of A.L.C. pending the outcome of the third trial in this matter. Petitioners requested a stay of all proceedings on J.C.'s motions pending the outcome of this petition for a writ of certiorari. All motions will be heard on September 3, 1985.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DECISION ALLOWS A TRIAL COURT TO REMOVE A SIX YEAR OLD ADOPTED GIRL FROM HER PSYCHOLOGICAL FAMILY AND THE ONLY SAFE, STABLE HOME SHE HAS EVER KNOWN, WITHOUT CONSIDERATION OF HER BEST INTERESTS.

If this Court does not grant the writ, a six and one-half year old girl (A.L.C.) may be removed from her adoptive home of over two years, and placed either in permanent foster status or in a home where, as an infant, she was neglected and abandoned. The present proceedings in the Wisconsin state court may summarily void A.L.C.'s adoption and birth certificate and transfer her to foster status pending the outcome of J.C.'s third trial on a petition to terminate her parental rights. If, in the new termination trial, the jury finds J.C. presently fit, or another procedural error creates a third appeal, this child will remain in the limbo of permanent foster status with possible placement with J.C. A.L.C. has not lived in a house where J.C. resided since she was 21 months old.

This summary vacation of the adoption and birth certificate will occur without any court hearing evidence of the harm A.L.C. will suffer by leaving the only home she has lived in for more than nine months, and the only family with whom she has an emotional and psychological relationship.

By granting the writ, this court may protect this child from the irreparable harm caused by these proceedings which ignore her needs and interests.

II.

THIS CASE PRESENTS IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS

A.L.C. has a substantive right to remain with her only stable family, without disruption for reasons unrelated to her needs and interests. The denial of this right without a hearing which considers the impact of this deprivation contravenes basic notions of substantive, as well as procedural, due process.

Further, A.L.C. is subjected to this summary deprivation of her family solely because she is adopted; a similarly situated child living with her birth parents could not be so treated. Thus, the Court of Appeals' decision denies adopted children equal protection under the law.

Moreover, the Wisconsin Court of Appeals should not apply a new Wisconsin Supreme Court decision which requires reversal of the termination order, when the decision was issued after J.C.'s termination order was rendered and when J.C. filed her appeal after A.L.C.'s adoption.

Extensive statutory and case law protects minors in situations where they cannot protect themselves.[1] In the family context, however, case law focuses on the birth parent's substantive constitutional rights,[2] the overall integrity of the family,[3] and

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[1]*See United States v. Darby*, 312 U.S. 100 (1941), upholding the Fair Labor Standards Act of 1938 and its prohibition of the employment of minor children under the age of 16; *New York v. Ferber*, 458 U.S. 747 (1982), holding that child pornography, due to its patently harmful effect on the minor children involved, is outside of the protection of the First Amendment; *Sam Ginsberg v. State of New York*, 390 U.S. 629 (1968) (Stewart, J., concurring), holding that the state can prohibit the sale of pornography to minors because those under the age of 17 lack the requisite capacity for individual choice which is the presupposition of the First Amendment.

[2]*See Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982).

[3]*See Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) (Stewart, J., concurring in judgment); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Quilloin v. Walcott*, 434 U.S. 246 (1977).

procedural rights of foster parents.[4] Although parental rights have been limited when a child's health or welfare is endangered,[5] few constitutional protections are extended to children in their familial relationships.

To date, this Court has not expressly extended constitutional protection for adopted and foster children to remain with their adoptive families, with whom they have established emotional and psychological bonds and on whom they rely for their daily care and nurturance. Absent such constitutional protections, these children's interests need not be considered by a court deciding whether a violation of a birth parent's procedural due process rights requires reversal of the underlying termination order.

Once the termination order is reversed, the child's status is redetermined in light of a new termination proceeding.[6] This status determination is based, not on the child's interests, but on whether the prosecutor can prove that grounds for termination exist as of the date of the new hearing. If the birth parent is presently fit, or if the jury decides that she may be fit at some indefinite point in the future, her rights may not be terminated regardless of the child's interest in remaining with her adoptive family. If her rights are not terminated, adoption is not an option available to the court in the dispositional phase of the proceeding. If the adoptive family resides in a different county from the birth parent, as in this case, it is unlikely that the adoptive family will become the foster family should the court order foster placement.

By extending constitutional protections to adopted and foster children, this Court would ensure that their status is determined after consideration of the child's best interests, with appropriate

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[4]See *Mary Brown v. County of San Joaquin*, 601 F. Supp. 653 (E.D. Cal. 1985); *Smith v. Organization of Foster Families*, supra.

[5]See *Bellotti v. Baird*, 442 U.S. 662 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

[6]This statement assumes the county would reissue the petition to terminate; it is not required to do so. If it did not, the child would be placed with the birth parent who was the subject of the initial petition.

recognition of the child's constitutional rights as well as the birth parent's procedural due process rights. Such an approach is consistent with this Court's acknowledgment that the constitutional protections afforded families flow not only from biology, but also from "the emotional attachments that derive from the intimacy of daily association, and from the role it [family relationship] plays 'promoting a way of life' through the instruction of children," *Smith v. Organization of Foster Families, supra,* at 844 citing *Wisconsin v. Yoder, supra,* at 231-233. *See also Caban v. Mohammed,* 411 U.S. 380 (1979) and *Lehr v. Robertson,* 463 U.S. 248 (1982), where this court protects familial relationships based on the actual care and contact between parents and children.

Petitioners contend that the Wisconsin Court of Appeals' decision, which considered only J.C.'s rights, violated both A.L.C.'s fundamental right to live with her psychological and legally adopted family, and Mr. and Mrs. B.J.'s right to maintain the integrity of their present family. Two trial courts have found that foster care will not protect A.L.C.'s best interests and cannot provide for her particular needs. There is no evidence that J.C. will be able to provide an appropriate home for A.L.C. or maintain a healthy relationship with her. Leaving A.L.C. in the permanent limbo of foster care for the next 12 years of her life contravenes her fundamental right to protect the integrity of her adoptive family. Removing her from this home, or altering her status, without a consideration of this interest, violates principles of due process and equal protection under the law, contrary to the 14th Amendment of the United States Constitution.

Even if this Court determines that A.L.C.'s rights are not of a constitutional dimension, the Wisconsin Supreme Court's decision in *M.A.M.* should not have retroactive application. This Court has recognized the test for non-retroactivity in both constitutional and non-constitutional cases. In *Lemon v. Kurtzman,* 411 U.S. 192 (1973), this Court set out a four-part test to determine whether a decision should be given non-retroactive effect:

(1) Would non-retroactivity "substantially undermine the constitutional issues at stake," *Id.* at 201;

(2) Would the resulting "reliance interests" offset the constitutional harm, *Id.* at 203;

(3) Was there "bad faith" or a "plainly unlawful statute," *Id.* at 297; and

(4) Do considerations of "federalism" suggest that the remedy be confined to future cases, *Id.* at 208.

In this case, the first three considerations resolve in favor of the child, and the last is not applicable. J.C.'s constitutional rights have not been "substantially undermined." It must be remembered that the decision to try a case to a court or jury is a strategic one that may be unrelated to substantive rights, and that J.C. was represented by knowledgeable counsel who stipulated to a trial to the court in both termination proceedings. Further protection of J.C.'s rights was guaranteed by the Agency's numerous attempts to assist J.C. with parenting and employment problems and by numerous discussions with the Agency concerning the consequences of her erratic behavior and unplanned travel.

The "reliance interests" in this case—the final adoption of the child and the resulting family relationship—clearly outweigh any harm to the birth mother.

There is no "bad statute" involved, but only a recent state court interpretation of how that statute is to be implemented. Finally, there are no considerations of "federalism" in this matter.

J.C.'s rights must give way to the interests of A.L.C. because a retroactive application of the Wisconsin Supreme Court's ruling substantially infringes on A.L.C.'s health, her welfare, and her right to remain with the only safe, stable family she has known.

The fact that this appeal was based on a procedural objection, which could have been raised in the first appeal, and does not allege insufficient evidence of J.C.'s inability to care for A.L.C., is a strong indication of A.L.C.'s fate if this Court does not grant the writ. Either the new proceeding will disrupt the adoption and unsettle the child, only to have the adoption reinstated after many months of investigation, trials and further appeals; or the fact-finder may determine that J.C. might be able to parent at some indefinite time in the future, placing A.L.C. in foster status for the next 12 years, and thereby preventing her from having a permanent, stable family during her minority.

Either result is clearly contrary to A.L.C.'s best interests and violates the integrity of the new adoptive family, which, once

the adoption is completed, should be afforded all the parental and family protections of birth parents.[7]

Removing A.L.C. from her adoptive home and voiding the adoption order are not "procedural" acts, but acts which have a grave substantive impact on A.L.C.'s, and her adoptive family's, life. Most importantly, they strike at the core of A.L.C.'s right to be nurtured into adulthood in her existing stable, loving environment.

The petitioners respectfully request this Court to grant this writ, and to determine whether trial and appellate courts may ignore adopted children's due process rights and deny them equal protection of the law when correcting trial courts' procedural errors.

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[7] *Mary Brown v. County of San Joaquin*, supra.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the order of the Wisconsin Supreme Court.

Respectfully submitted,

LINDA S. BALISLE
(Counsel of Record)
802 East Gorham Street
Madison, Wisconsin
(608) 258-3366

MARY E. HOEL
(Guardian ad Litem)
202 Main Street
Cornell, Wisconsin
(715) 239-6921

TERRY L. NUSSBERGER
(District Attorney of Rusk County)

RICHARD ALAN GINKOWSKI
(Immediate Past District Attorney
of Rusk County)
Rusk County Court House
311 Miner Avenue East
Ladysmith, Wisconsin
(715) 532-2159

Dated: August 30, 1985.

APPENDIX

APPENDIX A

Filed June 4, 1985
Marilyn L. Graves, Clerk
Supreme Court, Madison, Wisconsin
No. 84-972

STATE OF WISCONSIN

IN SUPREME COURT

In the interest of A.L.C.;
J.C. v. Department of Social Services of Rusk County and Mr. and Mrs. B.J.

The court having considered the petition for review of an adverse decision of the court of appeals, district III, dated April 16, 1985, filed by Respondent-Petitioner, Intervenors-Petitioners and Guardian ad Litem for A.L.C., and also the motion to file a brief as amicus curiae by twenty-one interested organizations,

IT IS ORDERED the petitions for review are denied, with $50 costs to Appellant-Respondent.

IT IS FURTHER ORDERED that the motion to file a brief amicus curiae is dismissed.

STEINMETZ, J., dissents.

APPENDIX B

Filed June 21, 1985
Marilyn L. Graves, Clerk
Supreme Court, Madison, Wisconsin

No. 84-972

STATE OF WISCONSIN

IN SUPREME COURT

In the Interest of A.L.C.;
J.C. v. Department of Social Services of
Rusk County and Mr. and Mrs. B.J.

The court having considered the motion to reconsider and clarify the court's denial on June 4, 1985 of the three petitions for review, filed by intervenors-petitioners, Mr. and Mrs. B.J.,

IT IS ORDERED that the motion is dismissed. Pursuant to *Archdiocese of Milwaukee v. City of Milwaukee*, 91 Wis. 2d 625, 284 N.W. 2d 29 (1979) there is no legal basis for a motion for reconsideration, and the issue of the child's future temporary placement is initially one for trial court consideration.

No costs.

APPENDIX C

Filed April 16, 1985

No. 84-972

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

In the Interest of A.L.C.,
a person under the age of 18:

J.C.,

Appellant,

v.

DEPARTMENT OF SOCIAL
SERVICES OF RUSK COUNTY,

Respondent,

MR. AND MRS. B.J.,

Intervenors.

APPEAL from an order of the circuit court for Rusk county: WILLIAM D. O'BRIEN, Judge. *Reversed and cause remanded with directions.*

LaROCQUE, J. J.C. appeals an order terminating her parental rights to A.L.C. Because J.C. was not advised of her right to a jury trial as required by *In re M.A.M.*, 116 Wis. 2d 432, 342 N.W. 2d 410 (1984), the order is reversed.

This case began in 1982 when the county petitioned to terminate J.C.'s parental rights on grounds of neglect. J.C. was not advised of her right to a jury trial. Because the original trial judge failed to honor a request for substitution of judges, this court reversed the order terminating J.C.'s parental rights and remanded the case for proceedings before another judge. After a bench trial before the new judge, the court entered an order terminating J.C.'s parental rights on January 9, 1984. J.C. still had not been advised of her right to a jury trial.

On January 31, 1984, the supreme court decided *M.A.M.* and held that in termination of parental rights proceedings, the trial court has the duty to fully explain the parent's statutory rights, including the parent's right to request a jury trial. *Id.* at 441, 342 N.W. 2d at 415. This rule applies prospectively, except that the principles apply to *M.A.M.* and cases not final on the release date of the *M.A.M.* opinion, January 31, 1984. *Id.* at 442, 342 N.W. 2d at 415. A case is final when the right to appeal is exhausted. *Linkletter v. Walker,* 381 U.S. 618, 622 n. 5 (1965). Because at the time *M.A.M.* was decided J.C. could and did appeal the order terminating her parental rights, the case was not final.

The county and A.L.C.'s guardian ad litem argue that the best interests of the child outweigh J.C.'s rights. This court realizes that reversing this case obviously and unfortunately jeopardizes A.L.C.'s adoption. The rights of the parent, however, yield to the interests of the child only if the case is final. *M.A.M.*, 116 Wis. 2d at 442, 342 N.W. 2d at 415. Because this case was not final on January 31, 1984, the rule in *M.A.M.* applies. This court therefore concludes that the failure to advise J.C. of her right to a jury trial requires reversal. The case is remanded for an initial hearing on the petition to terminate J.C.'s parental rights.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

APPENDIX D

Filed February 3, 1984

STATE OF WISCONSIN
IN THE CIRCUIT COURT FOR RUSK COUNTY

In the interest of A.L.C., file no. 82JV25
a person under the age of 18

DISPOSITIONAL ORDER

The Court, having previously made its findings of fact and conclusions of law dated January 6th, 1984, pursuant to Wis. Stat. s. 48.427 makes the following order upon all the records and files in this proceeding:

IT IS HEREBY ORDERED that the parental rights of J.C. to A.L.C. are hereby terminated;

IT IS FURTHER ORDERED that the guardianship and custody of A.L.C. is transferred to the Wisconsin Department of Health and Social Services pending adoptive placement; and

IT IS ALSO ORDERED that the Wisconsin Department of Health and Social Services shall comply with Wis. Stat. s. 48.427(2)(b) and report to the Court on the status of A.L.C. on or before July 6th, 1984 and thereafter annually on or before July 6th until such child is adopted.

Dated this 9th day of January, 1984.

BY THE COURT:

/s/ WILLIAM D. O'BRIEN

William D. O'Brien
Circuit Judge

STATE OF WISCONSIN
CIRCUIT COURT
RUSK COUNTY

In the interest of:	ORDER
A.L.C., a person under the age of 18	CASE NO. 82JV25

A hearing was held before the Rusk County Circuit Court on October 25, 1982 to determine if the parental rights of J.C., mother of A.L.C., should be terminated. Prior thereto on September 8, 1982 a request for substitution was filed against the Honorable D. J. Sterlinske and the request for substitution was renewed at the commencement of the October 25, 1982 hearing. After the October 25, 1982 hearing at which time a decision was rendered by Judge Sterlinske terminating the parental rights of J.C., the case was appealed to the Court of Appeals. That court ordered that the order terminating parental rights be summarily reversed and the cause remanded with instructions to honor the request for the substitution of judge and that custody of A.L.C. remain with the Rusk County Department of Health and Social Services pending disposition of this matter in the trial court.

The case was subsequently transferred to this judge in July of 1983. A hearing was held on September 30, 1983. Pursuant to stipulation, portions of the October 25, 1983 hearing transcript were used as set forth in a letter from this judge to the Rusk County District Attorney, the attorney for J.C. and the guardian ad litem of A.L.C., said letter dated September 27, 1983. It was further conceded by all parties that only credible evidence that existed as of the date the original petition was filed, to-wit: August 11, 1982 was pertinent to the issue of whether or not J.C. [sic] parental rights should be terminated. Additional testimony, for purposes of deciding the termination question that was received on September 30, 1983 was confined to the events and circumstances as they existed prior to August 11, 1982.

Sec. 48.415(2) sets forth the standards which apply in this case:

"Continuing need of protection or services. Continuing need of protection or services may be established by showing that the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under sec. 48.345, 48.357, 48.363 or 48.265 containing a notice required by sec. 48.356(2), that the agency responsible for the care of the child and the family has made a diligent effort to provide the services required by the court, and:

(a) The child has been outside the home for a cumulative total of one year or longer pursuant to such orders and the parent has substantially neglected or willfully refused to remedy the conditions which resulted in the removal of the child from the home; or

(b) The child has been outside the home for a cumulative total of two years or longer pursuant to such orders, the parent has been unable to remedy the conditions which resulted in the removal of the child from the home and there is a substantial likelihood that the parent will not be able to remedy these conditions in the future.

In determining the facts to which the above stated law should be applied, the court has reviewed the entire file, the October 25, 1982 hearing transcript, the guardian ad litem's letter and recommendation dated November 2, 1982 and an updated report submitted by the guardian ad litem dated October 31, 1983, the September 30, 1983 hearing transcript and the testimony of the former guardian ad litem, Melinda Olsen, together with her report of November 3, 1981.

The minor has been in the custody of the Rusk County Department of Social Services since the spring of 1981. Thus, as [sic] the time of the filing of the original petition she had been in the custody of the agency pursuant to a court order for a period of over one year. The totality of the evidence makes it abundantly clear that the mother, J.C., has failed to exercise responsibility towards her child. This court will not recite each and every detail, as these details are set forth fully in the transcripts of the two hearings and the reports of the guardian ad litem. She has failed, practically since the child's birth on December 22, 1978 to provide any sort of stable living condition. During the period after the child's birth, and while she was still married, both she and her husband, W.C., whose rights were previously terminated, ended up in jail and in the prison system. The child was literally dumped at the home of the maternal grandparent, A.M., who attempted to provide a satisfactory home within her limited means. J.C. and her then husband, continuously moved about the country setting up temporary residences, without any real sense of stability, and then occasionally returning to the Rusk County area. The court is cognizant of the fact that some of the moves may have been necessitated by economic conditions which affected employment, but the totality of the C. wanderings was to deny the child any semblance of stable home life. After the parents separated, J.C. did make some halfhearted attempts to establish a residence. However, the primary burden for finding living quarters, obtaining assistance, in providing a household with the necessities for living, and all other responsibilities normally exercised by a parent, were placed upon the legal custodian, the Rusk County Department of Health and Social Services and its agents. Everytime a problem would arise, the attitude of J.C. was that it was the Departments [sic] problem and not hers. She displayed a total lack of concern and responsibility in providing even the minimal standards needed to maintain a household for her and her child.

While not controlling as to the ultimate decision in this case, the contents of a letter she sent to her mother during one of her trips to Florida is revealing of the type of lifestyle she is engaging in, rather than making any efforts to provide a stable home

for her child. The letter was objected to at the first hearing, but there was foundation testimony put in at the September 30, 1983 hearing and the letter was allowed into evidence. It is a part of the record herein.

The record is replete with many instances where the Department attempted to assist her in finding adequate housing, provide counselling regarding child rearing, and establish goals, which included working within the framework of the responsibility expected of those receiving general relief. In each and every instance she failed to avail herself of the programs set up for the benefit of her and her child. Her whole performance during the period of time that the child has been out of her custody can lead only to the conclusion that she has substantially neglected to remedy the conditions which resulted in the removal of the child from her custody in the first instance. The record is again replete with instances which show her utter lack of concern and responsibility towards her child and clearly indicate that she was, at the time of the filing of the petition, unfit to have the care, custody and control of a minor child.

This court was urged, at the September 30th hearing, to give J.C. "one more chance." While it was not particularly pertinent on the issue of termination, her conduct between the October 25, 1982 and the September 30, 1983 hearing gives little indication that she is prepared to change her pattern of living, which seems to consist of primarily satisfying her immediate wants and needs, rather than those of her minor child.

As pointed out in the report of the guardian ad litem, there is a need for stability in the life of A.L.C., and she has been enjoying that stability now for an extended period of time. To adopt the recommendations of Attorneys Olsen and Gay would be akin to donning rose colored glasses in the face of impending doom.

BASED ON THE FOREGOING, and the recommendation of the guardian ad litem, the court finds that the parental rights of J.C. to A.L.C. should be terminated.

THEREFORE IT IS ORDERED that the parental rights of J.C. to A.L.C. be and they are hereby terminated. Custody shall remain with the Rusk County Department of Health and Social Services for a period of one year, or until further order

of the court. Placement of A.L.C. is ordered continued in the current foster home until further order of the court.

Dated this 6th day of January, 1984 at Eau Claire, Wisconsin.

BY THE COURT,

/s/ WILLIAM D. O'BRIEN
William D. O'Brien
Circuit Judge, Branch II

Sent to:
Roy L. Gay
Mary Hoel
Richard Ginkowski

APPENDIX E

September 24, 1982

The Honorable Donald J. Sterlinske
Juvenile Court Judge
Courthouse
Ladysmith, WI 54848

Re: In the interest of A.L.C., DOB: 12/22/78
A Child in Legal Custody
Termination of Parental Rights

General Information:

Parents: Mother—J.C.
Tampa, Florida 33612

Father—W.D.C.
Tampa, Florida

Date of Original Custody Hearing: 9/25/80
Findings of the Court: In Need of Protection and Services
Date of Last Custody Hearing: 5/25/82
County of Legal Settlement: Rusk

Background Information:

A.L.C. was born on December 22, 1978, at Rehoboth Christian Hospital, Gallup, New Mexico (McKinley County). A.L.C.'s parents are W.C. and J.C. J.C. (nee: J.M.) was born on August 12, 1958, to R.M. and A.M. R.M. is deceased. A.L.C. continues to reside in _____. At age 17 legal custody of J.C. was transferred to Rusk County Department of Social Services for possession of controlled substance and beer. She was placed at Kester's Group Home in November, 1975. She remained there until July, 1976. In May, 1976, J.C. committed additional acts of delinquency (shoplifting). She was sent to Lincoln Hills in the Fall of 1976. In October, 1979, J.C. was placed on one year probation for car theft. On August 27, 1980, she was charged with the theft of

copper tubing. On September 8, 1980, she was sentenced to one year probation and 60 days in the County jail for giving liquor to prisoners in the Rusk County jail and driving without a valid license. On November 7, 1980, J.C. was sentenced to the State Penal Institution for Women at Taycheedah for 18 months. She had been charged with criminal damage to property and disorderly conduct.

W.C. was born on July 15, 1953, in Tampa, Florida to L.C. and J.C. W.C.'s parents currently reside in Crownpoint, New Mexico. This Agency is unaware of much of W.C.'s life when he was growing up. On April 14, 1972, at age 19, W.C. was sentenced to 7 years of probation in the State of Florida for possession of marijuana. On January 27, 1973, he was sentenced to 90 days in a county jail in Florida for burglary of an automobile. On December 31, 1973, he was sentenced to 2½ years in Florida prison for burglary. He was sentenced to two additional years in prison on December 13, 1974 for assault of an inmate. On January 24, 1977, he was paroled to the State of Wisconsin. On September 18, 1980, W.C. was sentenced to nine months in the Rusk County jail for two counts of theft. W.C. was convicted of a felony and incarcerated on January 5, 1981, in the Wisconsin Correctional Institue.

It is believed that W.C. and J.C. were married on June 11, 1977, in Tampa, Florida by W.C.'s father, L.C., who is a minister. Rusk County Department of Social Services became involved with W.C. and J.C. in October, 1979, after receiving a referral that they were not providing adequate care for their child, their home was dirty and that W.C. was physically abusing J.C. W.C. and J.C.'s marriage was very unstable at that point and each of them talked about divorce. W.C.'s complaints were that J.C. was an "unfit" mother, and that J.C. was having extra-marital affairs when he was in the detox center in St. Croix and when he was in jail. W.C. stated on several occasions that J.C.'s parental rights should be terminated and A.L.C. be placed with his parents in New Mexico. J.C. in turn felt that W.C. was not being a responsible parent in that he was never home and that he drank too much.

W.C. did not seek any type of employment while he was in Rusk County. They were unable to effectively budget their AFDC grant and food stamps. On several occasions they lacked the money to purchase the necessary food, clothing and diapers for A.L.C. J.C. stated to her social worker that A.L.C. was present when W.C. physically abused her and she would become upset, frightened and cry.

On February 7, 1980, W.C. left for the State of Florida and he took J.C. with him. A.L.C. was left by her parents with her maternal grandmother, A.M. in _____. No formal proceedings or placement was made through the County Department of Social Services. On April 18, 1982 [sic], J.C. voluntarily returned to Rusk County. Extradition proceedings were commenced against W.C. He was returned to Rusk County in May, 1980. In April, 1980, expectations were set by this Agency for J.C. to get A.L.C. back. J.C. was to find a place to reside where she would be able to provide an adequate home for A.L.C. A disagreement developed between J.C. and her mother that ended in A.M. kicking J.C. out of her home. On May 1, 1980, A.M. was admitted to the hospital. She took an overdose of Tylenol and pain pills. A.M. supposedly took the overdose due to depression regarding her relationship with K.C. (a male juvenile). While A.M. was in the hospital, J.C. provided care for A.L.C. During that time, on one occasion when the social worker made a home visit, the social worker had to get J.C. out of bed at 1:00 p.m. A.L.C. had not yet been fed that day.

Due to A.M.'s emotional problems, A.L.C. was returned to J.C. Between mid-May and late August, J.C. moved four times. W.C. was released from Rusk County jail on bond in early June. He lived on and off with J.C. until September 2, 1980, when he was again arrested and placed in Rusk County jail. Some problems and concerns regarding the C.'s between May, 1980 through August, 1980 were:

1. J.C. and W.C.'s inability to establish a permanent and stable home for A.L.C.,
2. Continual inability to budget AFDC grant resulting in lack of money for food and clothing for A.L.C.,
3. Continual marital problems and domestic abuse,

4. A.L.C. being left with babysitters for a couple of days at a time and not notifying the babysitters of her plans before hand [sic],
5. J.C.'s inability to keep A.L.C. and the house clean.

On September 8, 1980, J.C. was arrested for driving without a valid license and providing prisoners with liquor. J.C. requested that A.L.C. be placed with her mother, A.M., until W.C.'s parents [sic] home in New Mexico was approved for placement of A.L.C. At that time both W.C. and J.C. wanted A.L.C. placed with W.C.'s parents in New Mexico. They had been discussing sending A.L.C. to New Mexico off and on since January, 1980. J.C. would change her mind about that arrangement every time she separated from W.C.

On September 9, 1980, a petition was filed with Rusk County Court alleging that A.L.C. was in need of protection and services due to the unstable parental environment and the parents' constant involvement in criminal activities. A hearing was held on September 25, 1980, at which time legal custody of A.L.C. was transferred to Rusk County Department of Social Services for a period of one year upon prior stipulation of the parties through their counsel. Temporary physical custody of A.L.C. was to remain with her maternal grandmother, A.M., pending the investigation of the father's parent's home located in New Mexico.

A considerable delay occurred in the investigation of the paternal grandparent's home. Rusk County Department of Social Services received a final report on January 16, 1981, disapproving this placement and requesting that A.L.C. not be placed in the State of New Mexico. Accordingly it was necessary to make alternative plans for the placement of A.L.C. A court hearing was held on February 12, 1981, and it was the position of Rusk County Department of Social Services that the maternal grandmother's home (A.M.) was not a proper placement for A.L.C. based on:

1. referrals received that there was a lack of food in the home, the house was cold and A.M. responding to A.L.C. with negative responses, [sic]
2. the home being only two bedroom [sic]. Residing in the home were: Mrs. M., her two children, C. and P., and A.L.C.,

3. Mrs. M.'s children's continual involvement in criminal activity as they were growing up which indicated lack of parental control, guidance and structure.
4. Mrs. M.'s emotional problems that had previously resulted in excessive intake of drugs and an attempted suicide in July, 1980.

On February 26, 1981, the Court found that the best interests of this minor child would best be served by an independent non-relative foster home placement. A.L.C. was placed at the C. and C.C. foster home in _____, Wisconsin, on March 9, 1981.

Adjustment to Foster Care:

Initially the C's had problems dealing with A.L.C.'s behavior. A.L.C. displayed inappropriate eating habits, she would display aggressive behavior toward the C's daughter (biting, hitting, pinching), she did not respond to affection or discipline and she would tend to manipulate people. Through the vast amount of time and attention that the C's devoted to A.L.C., her behavioral problems diminished somewhat. C. continued to be concerned about A.L.C.'s behavior and requested that she be evaluated. On September 14, 1981, A.L.C. was evaluated by Thomas Ricci, Psychiatric Social Worker, Northern Pines. Basic impression was that A.L.C. was a normal, healthy two year old child. Mrs. C. obtained a full-time job at the hospital in early Fall, 1981. She was unable to provide A.L.C. with the attention she needed thus the C's requested that alternate foster home placement be found. On October 29, 1981, A.L.C. was placed at the J. and B. L. foster home, rural _____.

A.L.C. made a good adjustment to the change in placement and to the L. home. She still displays some problems in the following areas: stubbornness, bad eating habits, insincere display of emotions, and destructive and aggressive behaviors. When A.L.C. is told not to do something she will do it anyway. When she is asked to do something, she will usually say "no."

A.L.C. is a cute three and a half year old girl with brown curly hair and brown eyes. She is a bright little girl and in spite of her behavioral problems she has a likeable personality. A.L.C. is a healthy child.

Visitations:

While W.C. and J.C. were in prison, transportation was a barrier to regular visitation. The C's transported A.L.C. to see her parents the weekend of April 24, 1981. Mrs. C. commented after the visitation that A.L.C. did not seem to know who W.C. was, but she did recognize J.C. The C's again took A.L.C. to see W.C. in Waupun on October 9, 1981. A.L.C. responded better to W.C. during that visit.

W.C.:

On November 5, 1981, W.C. was transported to Rusk County for a Court hearing. Arrangements were made for A.L.C. to see W.C. at Rusk County jail. A.L.C. responded well to W.C. during the brief time she was allowed to visit him. In December, 1981, W.C. was transferred to Camp Flambeau, Hawkins, Wisconsin. A.L.C. was taken to Camp Flambeau on December 16, 1981, and January 19, 1982. W.C. was transferred to Ladysmith on Feburary 1, 1982 to again testify in Court and arrangements were made for A.L.C. to visit with him on that day. A.L.C. responded well to W.C. during those three visits. Communication between A.L.C. and W.C. was limited in that W.C. was unable to understand a lot of what A.L.C. was saying. A.L.C. did respond appropriately to W.C. when he told her not to do something. A.L.C. always appeared to be happy to see her "daddy W.C.". On February 9, 1982, W.C. was released from the Wisconsin Correctional Institute. A visit was held at Rusk County Department of Social Services on February 12, 1982, between W.C. and A.L.C. W.C. left that date for the State of New Mexico. W.C. has made only one contact with A.L.C. since February, 1982, which was by letter in April, 1982. He has not attempted to contact her since.

J.C.:

On September 28, 1981, J.C. was released from Taycheedah. She returned to _____ and initially resided with her mother, A.M. J.C. did not inform this Agency of her return to _____ or request to see A.L.C. until this Agency contacted her by let-

ter for an appointment. A visitation was held on October 6, 1981, at Rusk County Department of Social Services. Also present at the visit was A.M. A.L.C. did not respond very well to J.C. and only went to J.C. when A.M. told her to. Prior to December, 1981 J.C. had three more visits with A.L.C.: October 17th at the M. home, November 5th at Rusk County Department of Social Services and November 26th–27th at the M. home. Mrs. M. informed the Agency after the Thanksgiving visit that she provided primary care for A.L.C. in that J.C. slept most of the time that A.L.C. was there.

On December 1, 1981, J.C. left the M. home. Her whereabouts were unknown to this Agency. On January 4, 1982, J.C. came into the Agency and stated that she was residing in _____. Visitation between A.L.C. and J.C. was discussed on January 15, 1982, between Judge Sterlinske, Darrold Wisherd—Probation and Parole and this worker. It was decided that temporarily, future visitations would be held at Rusk County Department of Social Services due to J.C.'s current living arrangements and her irresponsible disappearance for one month. J.C. was informed of these visitation arrangements on January 18, 1982. On February 1, 1982, while A.L.C. was visiting with W.C. prior to a Court hearing, J.C. appeared, also to testify at the hearing, thus she visited with A.L.C. J.C. did not contact this worker for a visit with A.L.C. at Rusk County Department of Social Services until her attorney, James Isaacson, contacted this Agency on her behalf on February 26, 1982. Visitations were scheduled for every Thursday thereafter. Dates that J.C. visited with A.L.C. are: March 4th, 11th, 18th, April 1st and 22nd. J.C. did not show up for three visits—April 15th, May 13th and 20th. This Agency cancelled three of the scheduled visits:

1. April 7, 1982—A.L.C. fell on the ice and had a slight concussion.
2. April 29, 1982—foster family went out of town to _____, Wisconsin, to visit relatives.
3. May 6, 1982—J.C. was receiving General Relief to pay her rent. She was responsible to show up for the Work Relief Program, however she was not coming in to work.

> J.C. had come into the Agency at 11:00 a.m. that morning requesting visitation. The visits were scheduled regularly for 1:30 p.m. She refused to wait until 1:30. Agency was contacted by _____ Police Department on that day stating that J.C. was possibly involved again in criminal activity. J.C. said that she was sick, however, refused to go to the Clinic for examination.

A.L.C. seemed to respond well to J.C. during the visits. The visits were held in early afternoons thus allowing A.L.C. to have lunch prior to the visits and also be able to have time to take a nap after the visits. J.C. would purchase candy, chips and pop for A.L.C. during these visits. On several occasions, A.L.C. became very upset with this worker when more candy was not provided for her while returning to the foster home. Following these visits A.L.C. was a behavioral problem in the foster home and it would take the foster parents several days to settle her down. Some of the behavioral problems A.L.C. exhibited were:

1. A.L.C. refused to eat prepared meals, she wanted chips and candy. She would force herself to throw up at the table when served balanced meals,
2. A.L.C. would wet her pants,
3. She was very defiant. She would scream at foster parents when they tried to discipline her.

A.L.C. made comments to the foster mother such as "My J.C. mom does not like daddy W.C." and "Daddy W. is not coming back." J.C.'s last contact with A.L.C. was on April 7, 1982.

A.M.—Maternal Grandmother:

While W.C. and J.C. were in prison, visitation was arranged with the maternal grandmother, A.M., for every second Saturday of the month. Since J.C.'s release from prison A.L.C. 's visits with A.M. have been:

1. Rusk County Department of Social Services on: October 6th and November 5, 1981 [sic]. March 18th and April 1, 1982.

2. Visits at the M. home were on: October 17th, November 26th–27th and December 22nd–23, 1981 [sic]. June 7th–8th, July 18th–20th, August 6th–8th, August 20th–23rd, August 28th–31st and September 9th–12, 1982.

J.C. refused to let A.L.C. visit A.M. in January, 1982, and requested that this Agency discontinue further visitation. A.M. has stated after several of her visits that she also has problems with A.L.C.'s behavior.

L. and J.C.—Paternal Grandparents:

During a phone conversation with Mrs. L.C., New Mexico, on September 13, 1982, she stated that she has not seen A.L.C. since A.L.C. was approximately six weeks old. Since A.L.C. has been in foster placement, the C's. have contacted A.L.C. by letter on two occasions; April, 1982, and September 24, 1982 (copy of letters attached).

Parental Involvement with Social Services:

Initially when J.C. got out of Taycheedah her plans were to live with her mother until W.C. got out of prison at which time she would move to New Mexico with W.C. and A.L.C. On October 5, 1981, J.C. requested that A.L.C. be returned to her immediately. On that date, J.C. was informed that regular visitation would be arranged and if she developed some stability in her life, cooperated with this Agency and showed that she was responsible to care for A.L.C., arrangements would be made to return A.L.C. to her. J.C. was also reminded that custody of A.L.C. was transferred to Rusk County Department of Social Services not only due to her criminal activities, but also the unstable parental environment.

On November 17, 1981, a Court hearing was held on the extension of the dispositional order regarding A.L.C. Custody with Rusk County Department of Social Services was extended for a period of six months until March 25, 1982. A.L.C. was found to be in continued need of protection and services. The Court found that it would be inappropirate for A.L.C. to reside with her mother, J.C., in the A.M. home. Placement of A.L.C. in foster

care was to continue until J.C. established a living arrangement independent of her mother. Primary reason for J.C. having an independent living arrangement was to enable her to take full responsibility of A.L.C. rather than depend upon A.M. as she had done off and on in the past. Plans were for this Agency, along with Darrold Wisherd, Probation and Parole, to assist J.C. in finding an independent living arrangement, however, primary responsibility for locating a place to live was to be left to J.C. When J.C. located an apartment to rent, an AFDC application was to be processed and this Agency planned to return A.L.C. to J.C. under the supervision of this Agency. Until the time that J.C. was living independently of her mother, visitation was to be on a bi-monthly basis.

On or about November 24, 1981, J.C. had a fight with her mother. On December 1, 1981, J.C. left the M. home. On December 10, 1981, Darrold Wisherd informed this Agency that J.C. was residing with a C.M. in _____. On December 11th this worker accompanied Darrold Wisherd to the M. residence to talk to J.C. J.C. was not there. On that date Mrs. M. was interviewed by this worker and Wisherd. She stated that she was upset about J.C.'s current behavior and she informed this Agency that J.C. had only made one attempt to locate a place to live. On December 15, 1981, J.C. contacted her mother and informed her that she was in Eau Claire. This was verified by Wisherd through a telephone conversation that he had with J.C. on December 16th.

J.C. did not contact this Agency until January 4, 1982. She stated that she was residing with a B.F. in _____, Wisconsin. Also residing in the F. home was Mrs. F.'s son, T. (age 19). She stated that she left the M. home because she could not get along with her mother. J.C.'s plans at that time were to divorce W.C. Due to J.C.'s disappearance for one month and not showing up for her appointments with her parole agent, it was questionable if there would be any repercussions due to her irresponsible behavior.

On January 15, 1982, a decision was made that visitation between A.L.C. and J.C. would temporarily be held at Rusk County Department of Social Services. This decision was based not only on J.C.'s current living arrangement, but also her re-

cent behavior. J.C. was informed of these visitation arrangements on January 18th. J.C. did not contact this Agency for a visit with A.L.C. at Rusk County Department of Social Services until arrangements were made by her attorney, James Isaacson on February 26, 1982 (refer to section on visitation).

J.C.'s relationship with T.F. was questionable at this time. J.C. would vacillate between divorcing W.C. and marrying T., and trying to get back with W.C. On February 25th this worker and Darrold Wisherd went to the F. residence. On that date J.C. admitted that she was living with T. and had contacted an attorney to begin divorce proceedings. She also informed us that "when she got off parole, she was going to clean up _____. She was sick of people at the Courthouse playing head games with her."

In late March, 1982, B.F. decided to move to Alaska. J.C. contacted this Agency requesting that the Agency find her a place to live. Phone numbers of available apartments was provided to her. J.C. further requested that this Agency contact these apartments for her. This request was denied in that this Agency felt that J.C. needed to begin to take some responsibility for her life.

On April 2, 1982, J.C. moved to the hotel in _____. General Relief was paying the rent. On approximately April 27th J.C. moved to an efficiency apartment above the _____ Post Office. General Relief continued to provide the rent. In order to continue receiving General Relief J.C. was to be responsible to reimburse the County by being employed through the Work Relief Program. Initially J.C. showed up for work and was doing good on the job, however, on April 28th problems started to arise. On that day J.C. did not come in. On the following two days the Work relief Supervisor had to go to _____ and get her out of bed. Following that J.C.'s attendance was very sporadic. Due to J.C. not putting in the necessary hours, this worker was informed on May 12, 1982, that General Relief would no longer be providing J.C.'s rent.

On May 2, 1982, J.C. was released from parole. On May 6th this Agency was informed by _____ Police Department that they were investigating some criminal activities that J.C. was

possibly involved with. Current status of this investigation is unknown to this Agency.

W.C.

On December 16, 1981, during a visit to Camp Flambeau, W.C. informed this Agency of his plans for himself and A.L.C. following his release. W.C. expressed concern about J.C.'s behavior and stated that he did not want her to have A.L.C. He stated that he wanted A.L.C. placed with his parents—L. and J.C.—in the State of New Mexico and he requested that another study be completed on his parents' home. On December 21, 1981, this Agency filed this request through Interstate Compact. W.C.'s plan was to spend a few days in L._____, following his release, until he could arrange transportation to New Mexico. W.C. planned on locating a job and housing near his parents' home. W.C. wanted his parents to care for A.L.C. until such time as he was financially stable [sic] to do so. His intention was to maintain weekly contact with A.L.C.

W.C. was released from prison on February 9, 1982. He left L._____ for New Mexico on February 12, 1982. While in L._____ W.C. maintained that his plan was the same as he had previously stated. W.C. also stated that he had no intention of resuming his marital relationship with J.C. At that point W.C. seemed genuinely interested in A.L.C. and providing a home for her. In April, 1982, W.C. sent A.L.C. a letter from New Mexico (copy of that letter attached). Shortly thereafter, in April, W.C. left New Mexico for the State of Florida. W.C. has made no contact with this Agency since February 12, 1982, and he has made no contact with A.L.C. since that letter in April, 1982.

Current Situation:

On March 15, 1982, this Agency received a report from Sandoval County Department of Social Services, Bernalillo, New Mexico approving the L.C. home for the placement of A.L.C. Concern was expressed regarding the contrast between the report submitted from New Mexico in January, 1981 and this report regarding the C. family. The guardian ad litem involved in this

matter requested that Court proceedings be postponed until such time as she could investigate the C. family in New Mexico.

On May 25, 1982, a hearing was held regarding the extension of the dispositional order. At that hearing the guardian ad litem disapproved the placement of A.L.C. with her grandparents in New Mexico based on: the geographical area, W.C. was no longer in New Mexico and the C's. were no longer residing in Sandoval County. They had moved in early May to McKinley County and the guardian ad litem was unable to locate them. Legal custody of A.L.C. was extended for one year dating back to September 25, 1981. The notice required under S. 48.356 of the Wisconsin Statutes of possible termination of parental rights was given by the Court on May 25, 1982. The conditions that the Court found necessary for the return of A.L.C. to the parental home were:

1. Establish an independent living arrangement and demonstrate personal stability by refraining from involvement in any further activities contrary to the law. Attempt to become self-supporting by getting a job, obtaining education or training for employment, and cooperate with Agency social worker in planning and making use of appropriate services.
2. Attend counseling on a regular basis to assist in obtaining appropriate parenting skills. The length of counseling to be determined by the therapist.

Placement of A.L.C. in foster care was to continue until such time as either parent could provide a stable environment for her. J.C. was present at that Court hearing but W.C. was not. On June 3, 1982, a letter was sent to W.C. by this Agency informing him of the May 25th Court hearing and notice of possible termination of parental rights. W.C. did not respond to this letter. On May 26, 1982, A.M. received a phone call from J.C. J.C. informed her mother that she was in _____, Wisconsin, with a G.T. She was hitch-hiking to Florida to find W.C. The last contact that J.C. had with this Agency was on May 25, 1982. Last contact that J.C. had with A.L.C. was on April 22, 1982.

On August 10, 1982, during a phone conversation with J.C., W.C.'s mother, she informed this Agency that W.C. was in Tampa, Florida. She stated that he does not have a permanent residence nor employment. She stated that it was her understanding that W.C. was heavily involved with both alcohol and drugs. Mrs. C.'s information was obtained from W.C.'s maternal grandparents—Mr. and Mrs. O.D.—who have contact with W.C. in Tampa.

On August 18, 1982, A.M. contacted this agency stating that she received a letter from J.C. (copy of letter attached). In the letter J.C. talks about: being physically beaten by W.C. and W.C.'s friend, [and] her friends carrying guns and drugs (black beauty). On August 29, 1982, A.M. received a phone call from J.C. J.C. informed A.M. that she was no longer living with her girlfriend. She was living in a car.

On August 11, 1982, a petition for termination of parental rights was filed with Rusk County Court. Initial hearing was held on the matter on September 8, 1982. Neither W.C. nor J.C. were present at that hearing. W.C. had been personally served with the petition and notice of hearing, but J.C. was not. The hearing was adjourned until September 27, 1982. Notice of hearing was to be published for three consecutive weeks in local Tampa, Florida newspaper as required under S.48.42(4)(b)4 of the Wisconsin Statutes.

On September 20, 1982, A.M. contacted this worker that J.C. was in _____. J.C. informed A.M. that she came to _____ to get A.L.C. and take her back to Florida. A.M. stated that J.C. further informed her that she had a gun. On September 21st, J.C. came to Rusk County Department of Social Services. She left prior to Phil Strop, Social Work Supervisor, being able to talk with her. It is believed that J.C. is staying in the _____ area.

Conclusions and Recommendation:

J.C. was released from Taycheedah in September, 1981. W.C. was released from the Wisconsin Correctional Institute, Waupun, in February, 1982. Neither J.C. or W.C. have maintained any stability in their lives (employment or living arrange-

ment) since their release and both have had ample time to do so. To the best of this Agency's knowledge neither W.C. or J.C. have obtained any counseling for parenting skills.

Visitation between A.L.C. and her parents were arranged by this Agency during both parents' incarceration and upon their release from the State Penal Institution. A.L.C. appeared happy to see both parents during the visits, however, she rarely mentions either her "J.C. mom" or "daddy W." in the foster home. In August, 1982, A.L.C. was observed by the foster mother talking on a play telephone. A.L.C. was saying that her daddy W.C. and J.C. mom were in heaven. Neither W.C. or J.C. have had any contact with A.L.C. for the past five months, since April, 1982.

A.L.C. has not resided in the parental home since she was 21 months old. She has resided in foster care for the past 18 months. Prior to that she resided with her maternal grandmother for seven months. While A.L.C. was still in the custody of her parents, she resided with her maternal grandmother off and on.

A.L.C. is a 3½ year old white female child who is experiencing good health. The likelihood of A.L.C. being adopted after termination of parental rights is good. The State of Wisconsin is willing to accept guardianship and custody of A.L.C. in the event that parental rights are terminated. Letter dated August 30, 1982, from Leonard S. Killen, MSSW, State of Wisconsin, Department of Health and Social Services, Western Regional Office, is in the court file.

It would be in A.L.C.'s best interest to enter into a stable and permanent family relationship that her parents are unable to provide. A.L.C. has been in two different foster home placements in the past 18 months. Her behavior continues to be somewhat unsettled due to the lack of a permanent home environment and the sporadic contact with her natural family.

This Agency recommends that the parental rights of J.C. and W.C. be terminated on their minor child, A.L.C., and that

guardianship and custody of A.L.C. be transferred to the State of Wisconsin for placement in an adoptive home.

Respectfully submitted,

/s/ CATHY HEMMY

Cathy Hemmy
Social Worker II

Approved by,

/s/ PHIL STROP

Phil Strop
Social Work Supervisor
Rusk County
Department of Social Services

Dated: September 27, 1982

Attachments

APPENDIX F

(8–11–82) [sic]

Dear Mama & [sic] Kids:

High [sic], thought i'd [sic] write a few lines and let you all know what I'v [sic] been up to lately.

well [sic] right now I'm at work. yea [sic], got me a job, [sic] I'm working as a dancer in a place called this is it [sic]

I'm not doing bad at all. I'll be getting my own place Hopefully [sic] this weekend.

My boy friend [sic] denny [sic] is thinking about moving in with me.

But thats [sic] out of the picture so far.

Hes [sic] 30 years old and treats me with respect.

tomorow [sic] for my birthday Him [sic] and his brother's [sic] are having a bar-b-Q [sic] for me, a baby case, two of them [sic].

and [sic] 12 cases of beer and i [sic] don't have too [sic] pay out a Penny [sic].

their [sic] all very nice to me. My best friend Melven [sic] let's [sic] me drive his car to work all the time.

Sorry it took so long to write mama [sic], but I'm very well busy [sic].

But today i [sic] had to write so you'd quiet [sic] worrying about me.

I cut the sides of my hand the other day, [sic]

today's [sic] the first day, [sic] I've work [sic] in 3 day [sic], cuz i [sic] got the shit beat out of me by bill's [sic] best friend, [sic] bill [sic] isn't no man [sic] his [sic] a mouse.

But i [sic] have something [sic] for his fat ass.

See denny [sic] & [sic] his brother's [sic] watch over me like a hawk.

And thay [sic] all carry 25 automatits [sic] in their back pockits [sic] and bill [sic] should have more since [sic] then [sic] to mess around with me, [sic] I've only seem [sic] him once in 3 1/2 months until [sic] the other night [sic]

when he knocked the hell out of me, but denny [sic] & [sic] the boys fixed him.

Anyway [sic] when i [sic] mail this letter Im [sic] going too [sic] send you a little money for the phone calls I made to you a while [sic] back.

it [sic] might not be much, but its something.

Hell i'll [sic] be send [sic] you a birthday [sic] gift in a week or two, Mom.

Yeah i [sic] miss every one [sic] up there a hell of alot [sic] ya [sic] know, [sic]

its [sic] like i [sic] have no one any more [sic].

but [sic] every one of you are [sic] in my heart at all times.

I let my nails grow back out again.

I'v [sic] lost alot [sic] of wairt [sic] also, we wear two pecie [sic] Swinging Suits [sic] i [sic] work from 1-9 pm [sic] and then once in a while [sic] 7-3 am [sic].

tonight [sic] i'll [sic] pull 16 1/2 hours here but the money we make, we take home with us.

Mom how did things turn out for Randy F._____?

I'v [sic] had him on my mind for a while [sic] now, [sic]

And it really get's me down when i [sic] think about it.

I still have feelings for him a lot [sic].

if [sic] i [sic] had his address i'd [sic] write to him.

I cut my hand wide open Sunday cuz [sic] i [sic] was in a fright [sic], over some shit, [sic] Well not really over shit, but out [sic] my Boy [sic]. Dennis G._____

that [sic] his name.

He's one hell of a man.

I'm writing now with my paper straight. Denny hate's [sic] the thought of me working here as a dancer, [sic]

But like i [sic] told him, its [sic] a jab [sic] and its [sic] money in my back packet [sic].

I keep all my bills pay'ed [sic] up & [sic] my bar tab at the broad Way [sic] Loung [sic].

if [sic] you ever need to get hold of [sic] me for anything call-626- [sic] 9005 and ask for me or patch's [sic]. that [sic] my nick name [sic] over there, [sic] at No Creek or you can call me at work-977- [sic] 2540.

I just got done talking to denny [sic] on the phone he [sic] said bill [sic] & [sic] his uncle were looking for me [sic] Cuz [sic] his uncle came up to the bar looking for Me [sic] to tell [sic] me a message for [sic] bill, [sic] Denny said he told Bill i [sic] was doing just fine without him.

So denny [sic] said he'll have his gun at my place tonight that [sic] way if Bill comes around i [sic] can kick his ass if he try's [sic] messing with me.

I can't take to [sic] much more of bills [sic] shit anymore.

I have some shit to clear up with my lover in Cadott a [sic] soon as i [sic] get my own place.

Angie Lee is one of then [sic] right now. Since Bill doesn't what [sic] her, then I'm gona [sic] keep trying until i [sic] get her.

I will not & [sic] can not [sic] take any more [sic] shit from bill [sic] Mom.

I'd rather see him under ground then [sic] have to put up with him any more [sic].

I have the car today and denny [sic] said to come to his house after i [sic] get off work tonight [sic]

Cuz [sic] he doesn't what [sic] me around f = ing [sic] Bill he said.

Mom Bills [sic] messing around with the wrong people Cuz [sic] thay [sic] will hurt him very Badly [sic].

I know cuz [sic] i hang around every chance i get.

And that's cuz [sic] their [sic] my friends, and they dislike Bill all the way [sic]

Hay [sic] have heard from James lately will [sic] you Please [sic] send me his address so i [sic] can write to him. [sic]

Me and Sugere [sic] are the only two, [sic] working day staff today, [sic] She'll leave at 9 pm [sic] and i [sic] won't leave until 3 tomorow [sic] Morning [sic].

And then drive over to dennys [sic] house for while then go home clean [sic] up and sleep for 2 1/2 hours.

I'v [sic] only had 5 hours sleep in the last 14 days now.

I'v [sic] been taking diet pills like hell, But [sic] thay [sic] really don't stop the sleepyness [sic] I feel.

But Allan a friend [sic] is getting me some Black Beautlys

[sic] tomorow [sic], before work i [sic] have to stop by and pick them up and pay him off.

He suppli's [sic] all i [sic] need. He gives me the best of every thing [sic] i [sic] ask for.

He's a very nice gentleman, and he's 21 yr's [sic] old.

its [sic] been a slow day here at work. But tonight things will pick up later on tonight [sic]. Hell [sic] the other night i [sic] Cleared [sic] $57.00 wish [sic] is bad. So tonight i [sic] hope to go home with $200.00.

durin [sic] the day denny [sic] let's [sic] me know whats [sic] going on. So when i [sic] get home, I'm ready for what ever [sic] it is. I'm really glad i [sic] have the car. My friend's [sic] down here treat me very nice, and thay [sic] also trust me, [sic] more then [sic] anyone in Wisconsin ever has [sic]

How's Grandma & [sic] Pa [sic] doing? tell [sic] Grandma i [sic] send my love to here [sic].

is [sic] Chryel [sic] being good or is she still getting out of hand?

tell [sic] her i [sic] said Hello [sic] and give Warren a Hug [sic] & [sic] Kiss [sic] for me.

Mom will you send me some pictures of Angie Lee Cuz [sic] mine got [sic] tooken [sic].

And [sic] i [sic] done [sic] have any at all. I'd love to have some to put on my wall's [sic]

I have alot [sic] of things i [sic] have to buy Before [sic] i [sic] get my own place.

I'm not sure if i'll [sic] have anyone move in with me yet.

Well I'm running out of things to say, so i'll [sic] go then [sic].

Please at least send me two or three pictures of the baby.

With love [sic] & [sic] respect [sic]

Julie Ann

P.S. tell [sic] everyone Hello [sic] and to Write [sic] me.

By By By [sic]

MOTION FILED
SEP 3 0 1985

No. 85-364

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BEST AVAILABLE COPY

In the Interest of A.L.C.,
a person under the age of 18:

DEPARTMENT OF SOCIAL SERVICES
OF RUSK COUNTY,
Petitioner,

A.L.C., by her Guardian ad Litem,
Petitioner,

MR. AND MRS. B.J.,
Petitioners,

v.

J.C.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN IN SUPPORT OF PETITIONERS

CHRISTIAN R. VAN DEUSEN *
MARGARET A. COBERLY
CHRISTIAN R. VAN DEUSEN, INC.
A Professional Corporation
615 Civic Center Drive West
Suite 305
Santa Ana, California 92701
714-547-6226

NATIONAL ASSOCIATION OF
COUNSEL FOR CHILDREN
1205 Oneida Street
Denver, Colorado 80220
303-321-3963

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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A.L.C., by her Guardian ad Litem,
Petitioner,

MR. AND MRS. B.J.,
Petitioners,

v.

J.C.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States of America and to the Associate Justices.

IT IS RESPECTFULLY REQUESTED that the undersigned, Christian R. Van Deusen, Esquire and the National Association of Counsel for Children be granted leave to file an amicus curiae in support of the position of A.L.C., a person under the age of 18. This application is based on the following facts:

The applicant is licensed to practice before this Supreme Court.

Appellant A.L.C. filed a Petition for Writ of Certiorari and supporting brief.

The issues in this case involve the due process rights of a child and her psychological parents to maintain their relationship; judicial recognition of the best interests of foster and adoptive children; and the status of adoptive parents, biological parents, and children in light of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America.

My firm's practice consists exclusively of adoptions, foster parent adoptions, termination of parental rights, children's rights cases, and associated litigation and appeals.

My firm currently has cases in trial courts in counties throughout the State of California that involve the issues currently on appeal in this case. Those cases are as follows:

Orange County, Case Number AD-36119;

Los Angeles County, Case Number CF-006072;

Los Angeles County, Case Number A-14928;

Orange County Case Numbers AD-35842/A-126566;

San Diego County, Case Number A-29782

Los Angeles County, Case Number CF-003074

San Diego County, Case Number A-28833

Humboldt County, Case Numbers J-409149/3309

Kern County, Case Number F-801/Juvenile Department 52879

Riverside County, Case Number A 10525

Orange County, Case Number AD-36931

In total, during the past twelve (12) months this firm has litigated 29 adoption cases in which parental rights were at issue. An equal number was resolved by waiver or default.

My firm currently has a case before the 1st District Court of Appeals of the State of California (Humboldt County Case Numbers 24673 and 3216—Termination of Parental Rights) and two cases before the 4th District Court of Appeals (Orange County Case numbers AD 36649 and J407060—Termination of Parental Rights and (case # G001472—Rights of a Biological Father) all of which involve these constitutional issues.

My firm represents Petitioners in the case of *Michael U. v. Jamie B.* 160 Cal.App. 3d 193 (1984) which case was decided by the Supreme Court of the State of California. This case involves the rights of a casual father and our State Supreme Court has, in that decision failed to address the constitutional rights of the psychological parents vs biological parents and the children involved.

I am currently assisting counsel on a case before the Illinois Supreme Court, and a case in Syracuse, New York both involve the rights of foster parents, adoptive parents and the subject children.

The applicant has frequently been court appointed to represent the best interest of minor children.

The applicant is serving a 4th term on the California State Bar Committee on Adoptions.

The applicant has testified before the California Select Committee on Youth and Children.

The applicant has been granted leave to file a brief amicus curiae before the Supreme Court of the State of California in the case of *In re Baby Girl M.* 37 Cal. 3d 65 (1984) which involved the rights of a biological father.

The applicant has lectured to the annual judges' family law seminar of the California Center for Judicial Education and Research on the subject of Adoptions, Abandonments and Paternity Cases, and authored the Syllabus on those topics.

In January of 1985 the District Court, Eastern District of California rendered a decision in *Brown v. County of San Juaquin*, [601 F. Supp. 651 (1985)] which recognized, in light of California State Law, the due process rights of a psychological parent and child to maintain that relationship.

In *Brown (supra)*, the Court cited *Smith v. Offer* [431 U.S. 816 (1977)] and *Lehr v. Robertson* 463 U.S. 248 (1983)] in reasoning that Fourteenth Amendment rights to Due Process attach to a psychological parent and child. It is necessary to our practice and the pending cases that this Court affirm the validity of *Brown's* interpretation of its cases.

The decision in *Brown* conflicts directly with the 1984 California Supreme Court case *In re Baby Girl M.* For over 25 years California State Courts have considered District Court cases to be "merely persuasive" [*Rahr Aircraft Corp. v. County of San Diego* 5 Cal. 2d 759 (1959)] However, that case reaches its decision as applicable to issues of law on which the Supreme Court of the United States has not spoken and on which the District Courts are divided in their opinions. It is, therefore, necessary that the Court address the validity of the *Brown* decision in order to define the standards which the State Courts must apply in determining parental rights cases.

Because *Brown* and *Baby Girl M.* appear to be in conflict, it is necessary that leave be granted to file a brief amicus curiae because of the involvement in *Michael U. v. Jamie B.* which was decided September 19, 1985 by the Supreme Court of California and has clouded further

the issue of *Baby Girl M.* and *Brown v. County of San Juaquin.*

If the Court affirms the psychological parent and child's right to Due Process as recognized in *Brown*, it is necessary to this firm's practice that the Court clarify what affect those rights have on the burden of proof and the standard of proof in right of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States of America.

Because the nature of this applicants practice and its interest in the issues on appeal, it is uniquely qualified to assist the court by the presentation of an amicus curiae brief.

The National Association of Counsel for Children is a voluntary, national membership organization concerned with the rights and interests of children who are the subjects of child protective, matrimonial, and custody litigation. Established in 1977, the Association has 450 members in 39 States. Membership is predominantly lawyers and judges, but also includes pediatricians, social workers, child psychiatrists and psychologists, law enforcement officers, and private citizens. The Association issues standards and guidelines on the representation of children, holds seminars on legal proceedings affecting children, prepares training and resource materials, and publishes a quarterly newsletter, The Guardian.

The Association's interest goes beyond its generalized concern over the legal rights of children. The majority of the Association's members are involved in representing children before the courts; many other members provide court related services to them. Hence, the outcome of this case will have a tangible impact on the work and professional practice of the Association's members.

Counsel LINDA BALISLE, TERRY NUSSBERGER and MARY HOEL have consented to the filing of the Amicus Curiae brief. Their letters of consent will be

filed with the Court concurrently with this brief. Counsel RICK MARTIN, Assistant State Public Defender, has not consented.

Such brief is prepared and filed concurrently herewith.

Respectfully submitted,

CHRISTIAN R. VAN DEUSEN
MARGARET A. COBERLY
CHRISTIAN R. VAN DEUSEN, INC.
A Professional Corporation
615 Civic Center Drive West
Suite 305
Santa Ana, California 92701
714-547-6226

Dated Sept. 30, 1985

QUESTIONS PRESENTED

Does equal protection and due process [Clauses of the 14th Amendment] require that the psychological parent-child relationship be treated the same as the biological relationship?

Is the best interests of the child the determinative factor in any dispute over custody in an adoption proceeding?

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IN THE

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OCTOBER TERM, 1985

No. 85-364

In the Interest of A.L.C.,
a person under the age of 18:

DEPARTMENT OF SOCIAL SERVICES
OF RUSK COUNTY,
Petitioner,

A.L.C., by her Guardian ad Litem,
Petitioner,

MR. AND MRS. B.J.,
Petitioners,

v.

J.C.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN IN SUPPORT OF PETITIONERS

Amici respectfully request that a writ of certiorari issue to review an order of the Wisconsin Supreme Court, dated and entered June 4, 1985, which denied petitioners' request for a review of a Wisconsin Court of Appeals' decision issued on April 16, 1985.

INTRODUCTION

The various States have applied disparate standards in parental rights cases, and in the case of California even

the casual father who has never "ligitimated" the child may pursue custody. Custody may not be denied him unless it can be shown that placing custody with him would be detrimental to the child.

Once he takes custody, he attains the rights of a presumed or marital father and has the power to veto the adoption. Such a veto is invariably contrary to the best interests of a child that has established a psychological parent child relationship, and obviously causes a grievous loss to the adopting (psychological) parents.

Amici here refer to and incorporate the following items of the petition for writ of certiorari:

Opinions below

Jurisdiction

Constitutional Provisions Involved

Statement of the Case

Reason for Granting the Writ.

ARGUMENTS ON THE QUESTIONS PRESENTED

The Court in *Stanley v. Illinois*, 405 U.S. 645 (1972) held that parental rights could not be terminated by State action without due process. In that factual situation the biological father clearly was also the psychological father. Although the Court does not address it directly, the decision that he would be entitled to due process under the 14th Amendment does not preclude a finding that the right to due process would attach if the psychological relationship were to be considered on its own.

The protection afforded the familial relationship was further clarified in *Quilloin v. Walcott*, 434 U.S. 246, 255 (1977) quoting from *Offer*, 431 U.S. at 683 concurring opinion by Stewart J.

> Rather, the result of the adoption in this case is to give full recognition to a family unit already in ex-

> istence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child. *Quilloin* at 255

Since OFFER, all Federal courts considering the issue have recognized that, at some point, the duration of a loving foster care placement, and the consequent emotional and familial ties it creates, establish a liberty interest in its continuance. *Kyees v. County Department of Public Welfare of Tippicanoe Co.*, 600 F.2d 693, 699 (7th Cir. 1979); *Drummond v. Fulton County Department of Family and Children's Services*, 563 F.2d at 1209, *Sherrad v. Owens*, 484 F. Supp. 728, 740-741 (W.D. Mich. 1980). See also, *Caban v. Mohammed*, 441 U.S. 380, 402 (1979) (Stevens, J., dissenting) ("The state interest in facilitating adoption in appropriate cases is strong—perhaps even 'compelling' "). In fact, at least one State Supreme Court has held that in certain "extraordinary circumstances", an independent right to termination and adoption arises, even in the absence of a statutory provision, because "the psychological trauma of removal is grave enough to threaten destruction of the child." *Bennett v. Jeffreys*, 40 N.Y.2d at 550, 387 N.Y.S.2d at 827, 356 N.E.2d at 284.

This Court's decision in *Lehr v. Robertson*, 463 U.S. 248 (1982) protects familial relationship based on the day to day nurture and care between parent and child.

Interpreting California law, the U.S. District Court (E.D. Cal) in a decision that cited *Lehr* stated:

> In short, the court concludes that the foster family relationship is sufficiently similar to other familial relationships held by the Supreme Court to be entitled to constitutional protection. The court reaches this conclusion because the foster parent-foster child relationship has precisely the same form and content

> as a healthy biological parent-child relationship, and in the face of that reality, the circumstances of its creation are immaterial.

Brown v. County of San Joaquin, 601 F. Supp. 653 (1985)

That court then goes on to state that: "the lodestar for any permanent plan for [the child] is her best interest."

The California Supreme Court in the case of *Michael U. v. Jamie B.* Docket #L.A.32014 September 19, 1985, declined to consider and rule on the question of the constitutional rights that attach to the parent child relationship.

In a 5 to 2 decision the Court found itself strongly divided in issuing 4 separate opinions, 3 for the majority and a dissent. Justices MASK, LUCAS and KAUS concurred in 2 separate opinions:

> The more I think about it, the more certain I am that the trouble with this case in not so much the fact-finding process, but this court's unfortunate misstep in *In re Baby Girl M.* (1984) 37 Cal 3d 65. The sooner we rectify that mistake, the better. KAUS, J., concurring.

> *In re Baby Girl M.* (1984) 37 Cal.3d 65, established by a divided decision of this court, that a casual inseminator could be declared a presumed father under the law and thus have the power to frustrate the unmarried mother's consent to adoption of her child by a qualified family and prevent the child from being reared in an environment with loving adoptive parents.

> This dramatically illustrates the fallacy of any test other than the best interest of the child. *Baby Girl M.* requires a finding that custody in the biological father would be detrimental to the child in order to deny him the same rights as a legally presumed father. MOSK, J & LUCAS J. concurring.

Although the plurality of 3 would reverse *Baby Girl M.* the required majority was lacking.

The rights of non-biological, or psychological, parents received clear constitutional protection in 1973. In *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909 (1973), the court heard an adoptive couples' appeal when their child was removed without a hearing by the agency, one year after being placed with them. The court then held that:

> "the Fourteenth Amendments' guarantee of due process of law requires notice and opportunity to be heard before an individual suffers governmental deprivation of a fundamental interest . . . In determining whether a status or right is fundamental, the courts consider its effect in human terms and its importance to the individuals' life situation. (*Bixby v. Pierno.* (1971) 4 Cal. 3d 130, 144 [93 Cal. Rptr. 234, 481 P.2d 242].)
>
> Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and mutual dependence set in ahead of official cachets, administrative or judicial. The placement initiates the closest conceivable counterpart of the relationship of parent and child.' (*Adoption of Barnett*, (1960) 54 Cal. 2d 370, 377.) To characterize enforced removal of the child as a 'grievous loss' is to state the obvious. (29 Cal. 3d at 916).
>
> The governmental interest is weighty. The statutory system for relinquishment to the agency, for agency placement and agency approval, bespeaks a state policy to promote the child's welfare in derogation of all other values . . . *C.V.C.* 29 Cal. App.3d supra at 916.

Although the notion that "blood is thicker than water" is still prevalent, Justice Friedman in FN7 makes this revealing observation:

> Is [biological parenthood] more natural or more important than the mutual, reciprocal and continuous relationship between parent and child, which may occur in adoptive or non-adoptive families, involved in the rearing of a child from infancy to maturity with all of the impact of day-to-day care and upbringing upon character, psychology, outlook, emotional make-up, and even biology which that entails? In this sense, does not nurture 'do the work of nature' and create one a child who by nature is a stranger? In fact, in this sense, does not nature do the work of nature and create one a child who by nature is not a stranger? (TenBroek, *California's Adoption Law and Programs* 6 Hastings L.J. 261, 276 (1955).

Once the standards of constitutional protection are brought into play, the parties must be treated equally. Indeed, to impose upon one type of parent a stricter standard or heavier burden of proof violates the 14th Amendment.

Further, to decide the future of a child, and the custodial placement in which the child will be forced to live, without consideration of the child's best interest, is a violation of due process and equal protection.

State intervention into enumerated or implied rights in the United States Constitution has been held to trigger a strict scrutiny of the statutes involved to insure that they do not violate the Equal Protection Clause of the Fourteenth Amendment. (*Shelly v. Kramer*, 334 U.S. 1 (1948); *Griswold v. Connecticut* 381 U.S. 479 (1965).

Brown (*supra*) recognizes the same fundamental liberty interest to attach to psychological parent-child relationships as attach to a biological parent child relationship. To avoid violating the Equal Protection Clause of the Fourteenth Amendment, it is essential to not give either the biological parent, the psychological parent or the child preference, one over the other. The same burden of proof must apply to each.

The pivotal factor must always be the best interest of the child.

In making a determination of the "best interests of the child," as referred to in the codes, the author of 49 Southern California Law Review 10, 34 provides some guidelines:

> "Once consent to the adoption has been given, California law, unlike the law of some jurisdictions, generally protects the child's interest in remaining in an adoptive home that has become its real home . . . In an independent adoption, consent may be withdrawn only with court approval after a hearing. The court may permit withdrawal of the consent and return of the child to his natural parents only if, under all the circumstances, withdrawal is reasonable and in the best interests of the child. Since his provision gives no specific guidelines to the courts, it is recommended that language be added to the effect that withdrawal of consent by a parent should, as a rule, be denied once the child has become settled in the adoptive home."

Adoption of Barnett (1960) 54 Cal.2d 370, 6 Cal. Rptr. 562, 354 P.2d 18, held that:

> "The rule of strict construction of our adoption statutes in favor of the natural parents. . . . , being inconsistent with the decisions of this court . . . . , as well as with Civil Code Section 4, is disapproved."

The court in *Adoption of Duckett* (1975) 48 Cal.App. 3d 244, 121 Cal.Rptr. 574, citing *San Diego County Department of Public Welfare v. Superior Court* (1972) 7 Cal.3d 1, 101 Cal.Rptr. 541, 496 P.2d 453, stated that:

> "The requirement of consent by a natural parent is not strictly construed in favor of the rights of the natural parent, but *instead is liberally construed in order to effect the object of the adoption statute in promoting the welfare of the children.*" (emphasis added)

The nature of these cases are such that emotional factors favoring either the biological parent or the adopting parents are always present and pose an obstacle to properly analyzing the case from the perspective of the child. In order to analyze this question, a number of factors must be taken into consideration. The court, of course, has a great deal of discretion, not only in determining what these various factors should be, but also in weighing the effect of each factor. Clearly, factors such as comparative wealth and parental preference have no place in the best interests analysis. It is submitted that the following should be considered.

The New York University Law Review, 446, at page 468 and f/n 27, specifically discusses certain factors with reference to the child's best interest and cites the Child Custody Act of Michigan when an attempt was made to isolate the factors for evaluation purposes:

> "For example, in determining the child's best interests, judges might be directed to consider a variety of factors, including the wishes of the child (if of the age of reason), the length of time the child has been separated from the natural parents, the quality of the child's relationship with the contesting parties, and the testimony of psychiatrists or child psychologists on the potential effect on the child of alternative dispositions.
>
> "At least one state statute has attempted to define the child's 'best interest:'
>
> " 'Best interest of the child' means the sum total of the following factors to be considered, evaluated and determined by the court:
>
> "(a) The love, affection and other emotional ties existing between the competing parties and the child.
>
> "(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

"(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the law of this state in lieu of medical care, and other material needs.

"(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

"(e) The permanence, as a family unit, of the existing or proposed custodial home.

"(f) The moral fitness of the competing parties.

"(g) The mental and physical health of the competing parties.

"(h) The home, school and community record of the child.

"(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

"(j) Any other factor considered by the court to be relevant to a particular child custody dispute."

Child Custody Act of 1970, Mich. Comp. Laws Ann., Section 722.23 (Supp. 1976)

The purpose of discussing the various factors in detail is to provide assistance to this court as to the impact of experts, writers and judicial decisions on the best interests question.

The factors submitted are certainly not intended to be all inclusive and, by reason of the nature of the question, may be overlapping in nature.

A comparative analysis without the application of any parental preference is required. This analysis must be from the perspective of the child, not the biological parent or the adoptive parent. *Adoption of Michelle T.* (1975) 44 Cal.App.3d 699, 706-8, states:

Recently, authorities have recognized the importance of the continuity of the environment and the trauma to a young child caused by separation from its established home has been viewed by the courts as a serious consideration in adoption cases. (*In re Adoption of Tachick* (1973) 60 Wis.2d 540 [210 N.W.2d 865, 869-871, and fns. 9 and 10 at p. 872]).

Furthermore, in *Williams v. Neumann* (Ky. App. 1966) 405 S.W.2d 566, the court stated that '[the petitioners have] attended every baby and childhood need and demand of [the child] from the fourth day of her life when she could neither focus her eyes nor raise her head. Up to this hour, according to this record, [she] has known no other mother as she has never seen her natural mother. She is now three and one-half years old and talking. She cannot be suddenly transplanted like a dogwood tree without running serious and dangerous risk of frustration and bewilderment.' (Id. at p. 557;). The court concluded that denial of the petition must be reversed and placed the child with the petitioners. . . .

Furthermore, the concept of 'best interest' presents a relative standard. The question is not whether a particular set of circumstances is in the best interest of the child, but whether a particular set of circumstances relative to an alternative set of circumstances is in the best interest of the child. In this case, the alternative presented is commitment of the child to the Department in order that 'adoptive or other suitable plans' may be arranged. While we recognize the difficulty the Department would have in submitting more definite plans, we conclude that the alternative presented places the court in a difficult position. It is asked to speculate on the future placement and to trust that it might be better than the home provided by petitioners. Although the court is powerless to predict future events which may bear on T.'s welfare, it has nevertheless, by its ruling in favor of the Department, affected the immediate continuity of the child-parent relationship.

> Goldstein proposes refining the 'best interest of the child' to a test which provides for 'the least detrimental available alternative for safeguarding the child's growth and development' (Id. at p. 53). The least detrimental alternative 'is that specific placement . . . . which maximizes, in accord with the child's sense of time and on the basis of short term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuing basis a relationship with at least one adult who is or will become his psychological parent.' (*Id.* at p. 53). The authors thus suggest that it may be wiser to favor a situation certain, which may not be totally satisfactory, than to engage in predictions of future events which may or may not be in the 'best' interest of the child."

Adoption of Michelle T. 44 Cal. App. 3d 699, 706-8 (1975)

By far the most important issue is the detriment that befalls the child when it is uprooted from the home, and the attachments to the psychological parents are broken. It is now recognized that these attachments form to such a level by age three months.

The syndrome that follows the disruption is anclytic depression. Experts agree that the impact of such a loss will be felt in varying degrees throughout the individuals life. Expert testimony will be required to present to the court the immediate impact, and the symptoms that appear; i.e. regression of verbal skills, motor skills, sleep loss, refusal of food, suppression of the immune system, bowl upset, general failure to thrive, lack of trust, refusal to form new attachments, repeated respiratory infections, etc. The intensity of these symptoms is directly proportional to the intensity of the reciprocal attachments between child and parent.

Amici Curiae respectfully request the court to take Judicial notice of a recent slip opinion from the 7th Circuit Court of Appeals in the matter of *Polovchak v. Meese*

etc. Case #85-2287 and 85-2305 C5595, September 10, 1985. That Court clearly stated the constitutional right of a child under the 14th Amendment to a hearing at which the Court must balance the best interest of the child against the rights of the parents. Although the opinion is not as yet published, it is relevant to the issues herein presented.

CONCLUSION

It is clear from the case law in the various jurisdictions that this Court address these issues and provide guidance in the application of the Constitutional provision and the 14th Amendment.

Respectfully submitted,

CHRISTIAN R. VAN DEUSEN
MARGARET A. [illegible]LY
CHRISTIAN R. VAN DEUSEN, INC.
A Professional Corporation
615 Civic Center Drive West
Suite 305
Santa Ana, California 92701
714-547-6226

NATIONAL ASSOCIATION OF
COUNSEL FOR CHILDREN
1205 Oneida Street
Denver, Colorado 80220
303-321-3963

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